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DEPARTMENT OF TRANSPORTATION

COAST GUARD

LAW BULLETIN

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FUNDING TRAVEL FOR STATE PERSONNEL ATTENDING THE COAST GUARD NATIONAL BOATING SAFETY COURSE

We have been asked whether a portion of the funds to be allocated and distributed to the States for their boating safety programs under 46 USC 13103(a) may be used for funding travel for State personnel attending the Coast Guard's National Boating Safety Course at the Reserve Training Center in Yorktown.

Section 13103 provides that the Secretary "shall allocate amounts available for allocation and distribution . . . for State recreational boating safety programs" in accordance with a prescribed formula. The formula provides that one-third of the amounts available for allocation and distribution shall be allocated equally among all eligible States, one-third shall be allocated in accordance with the number of vessels numbered in each eligible State, and the remaining third shall be allocated in accordance with the State amounts expended or obligated for recreational boating safety programs within each eligible State. Paragraph (c) of section 13103 provides that "[t]he Secretary may allocate not more than 5 percent of the amounts available for allocation and distribution in a fiscal year for national boating safety activities of national nonprofit public service organizations." From the language of this section, it does not appear that the Secretary would be authorized to withhold any portion of the funds available for allocation and distribution to the States in order to defray expenses incurred by the Coast Guard in assisting State recreational boating safety programs. This derives from the mandatory terminology found in paragraph (a), requiring available funds to be allocated and distributed in the manner prescribed, as well as the fact that only limited authority for the reservation of funds is found in paragraph (c).

Support for this interpretation is found in amendments to 46 USC 13106 accomplished under section 1012 of the Deficit Reduction Act of 1984, Pub. L. 98-369. Paragraph (a) of section 13106 now provides that two-thirds of the amounts transferred for fiscal years 1985 through 1988 from the Highway Trust Fund into the Boat Safety Account shall be available for State recreational boating safety programs. Paragraph (c) of section 13106 provides that one-third of the amount so transferred "is available to the Secretary for expenditures out of the operating expenses of the Coast Guard for services provided by the Coast Guard for recreational boating safety." In view of the clear delineation provided in this section between amounts available for the Coast Guard and for the States, it would be difficult to find legal support for your proposal to satisfy an expense incurred by the Coast Guard out of funds earmarked for the States. However, there would be nothing to preclude the States from using the funds they are furnished under 46 USC 13103 to finance the travel expenses of their personnel attending the National Boating Safety Course.

G-LGL memo 16755 of 28 Jun 1985

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ADMINISTRATIVE DISCHARGE BOARD PROCEDURES FOR DRUG OFFENDERS

A District Commander requested clarification of the Commandant's policy and procedures for the processing of administrative discharge boards relating to alleged drug offenders. Specifically, the Commandant's authority to limit the discretion of an administrative discharge board in the character of discharge that it may recommend is questioned.

The statutory authority for the administrative separation of enlisted personnel from the Armed Forces, including the Coast Guard, is found in 10 USC § 1169 which provides:

> "No regular enlisted member of an armed force may be discharged before his term of service expires, except -
>
> (1) as prescribed by the Secretary concerned;
> (2) by sentence of a general or special court-martial; or
> (3) as otherwise provided by law."

The authority of the Secretary of Transportation under 10 USC § 1169 has been delegated to the Commandant. See 49 CFR 1.45(a)(1). The Commandant has the authority to discharge enlisted members when done in compliance with regulations he prescribes. The Commandant has exercised his authority in Chapter 12-B of the Coast Guard Personnel Manual and Section 0510 of the Coast Guard Supplement to the Manual for Courts-Martial. In ALDIST 023/84, the Commandant specifically modified the duty of administrative discharge boards convened in drug cases. These modifications replace portions of Chapter 12 of the Personnel Manual, COMDTINST M1000.6. They create a power to discharge "as prescribed by the Secretary." A discharge effected under the provisions of ALDIST 023/84 is a proper exercise of the Commandant's authority under 10 USC § 1169.

This broad authority to prescribe rules and regulations for the discharge of enlisted personnel is not boundless. The proceedings provided must satisfy requirements of "fundamental fairness." Fundamental fairness as discussed in the case law is more aptly identified as "procedural due process." Due process analysis investigates "whether the members are deprived of an interest in property or liberty." Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). Whether Coast Guard administrative discharge board proceedings for drug offenders violate procedural due process depends on whether protected property or liberty interests are involved and whether, if involved, they are inadequately protected by the administrative discharge board procedures.

The discharge proceedings do not deprive service members of a property interest without due process. The Commandant has clearly stated his policy on the use of illegal drugs through a series of ALCOAST's and ALDIST's starting with ALCOAST 007/82 in April 1982. The latest statement of that policy was in July 1984 with the promulgation of ALCOAST 016/84. It stated in part:

"The Commandant's policy against the use . . . of illegal drugs or paraphernalia by any member of the Coast Guard has been in effect for over two years. Recruit training, unit indoctrination, and service issuances have all emphasized that drug abuse in the service will not be tolerated . . .. We will continue our efforts to educate our people on the dangerous and destructive impact of substance abuse on individuals and the service, but we will intensify our program to rid the Coast Guard of people involved with drug abuse."

The Coast Guard regulations create no reasonable expectation of continued military status once a member is determined to have been involved in a drug incident. The member can only have an expectation of continued military status by refraining from the use of drugs. Adequate due process is afforded the member through timely notice and hearing before a board of officers on the issue of drug use.

Since the Coast Guard provides a member a hearing and surrounds the hearing with procedural protections, the member receives due process of law. The administrative discharge board is a fact-finding body composed of three experienced commissioned officers, at least one of whom is serving in the grade of lieutenant commander or higher. A respondent before an administrative discharge board has procedural rights as outlined in the Supplement to the Manual for Courts-Martial, sections 0510d and 0304d. These rights ensure the member has a fair and impartial hearing and hence due process.

The Commandant has the authority under 10 USC § 1169 to discharge enlisted personnel according to the regulations he prescribes. In the area of drug offenses, the Commandant has prescribed regulations found in the Coast Guard Personnel Manual, the Supplement to the Manual for Courts-Martial, and in ALCOAST 016/84 and ALDIST 024/84. By these regulations, the Commandant has retained full discretion to characterize a drug user's discharge as honorable. In view of paragraph 12-B-32 of the Personnel Manual, in existence when the ALCOAST's announced drug policy was issued, administrative discharge boards could not recommend an honorable discharge. The Commandant has reserved the authority to make the final decision as to the character of discharge based on the record of the administrative discharge board and the character of service of the member. Article 12-B-32 of the Personnel Manual does not limit the Commandant's discretion to the highest character recommended by a board. Normally, a member who has been found to have been involved in a drug incident will receive a general or "under other than honorable conditions" discharge, but this does not mean that in extraordinary circumstances the Commandant would not discharge a member involved in a drug incident with an honorable discharge.

The Coast Guard provides a hearing and all due process protections in cases involving members having over eight years of service who are alleged to have been involved in a drug incident. Therefore, I conclude that the regulations currently in effect are valid and are

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a proper limit on the discretion of the administrative discharge board as to the character of discharge it may recommend.

G-LGL ltr 1900 of 11 Jul 1985

PROPOSED POLICY CHANGE ON MEMBERS SERVING CIVIL SENTENCES DURING OFF-DUTY HOURS

The Chief, Office of Personnel proposed to clarify Coast Guard policy on whether time served by a member in confinement or in the performance of community services during liberty hours as a result of a civilian court ordered sentence is deductible for pay and allowance purposes. The Coast Guard is considering adopting the policy of other Services, which do not deduct this time, provided an agreement is entered between the member's command and the court imposing sentence allowing the member to be returned to the command for duty in emergencies and when otherwise appropriate. It is felt that this policy could best be addressed in a section of the Military Justice Manual, or in a future Commandant Instruction. The questions presented are whether such an agreement is sufficient for the Coast Guard to meet its operational commitments and whether there would be a need for our legal staff to act on behalf of the Coast Guard in entering these agreements, or whether responsibility could rest exclusively with the member's commanding officer.

In Decision B-191301 of 17 May 1978, the Comptroller General ruled that a member serving a civil sentence on weekends under a work release program is not entitled to pay and allowances for weekends actually confined because the member was unavailable for military duty. The Comptroller General recognized that a member would be entitled to pay and allowances for any day in which he was paroled into the custody of military authorities and was available to perform duties commensurate with his grade and specialty. The Comptroller General stated that the controlling factor in determining the member's pay entitlement is whether he was under the effective control of the military, as opposed to the civilian authorities. It is evident that availability for duty was the consideration that formed the crux of the opinion, with the Comptroller General merely assuming that the member would be unavailable for duty on those days in which he was serving the civil sentence. If an agreement is entered with civil authorities assuring the member's return to duty at any time, there is no basis for placing the member in an unexcused AWOL status and for deducting the time served for pay and allowance purposes. Titles 10 USC 972 and 37 USC 503, providing for lost time and forfeiture of pay, respectively, are rendered inapplicable when the member is available for full duty.

We do not perceive any need for district legal office personnel, generally, to become involved in the preparation of agreements regarding a member's availability for duty while serving a civilian court ordered sentence. The agreement should instead be entered into by the member's commanding officer, with review by the district legal office, if circumstances require.

The Coast Guard's ability to meet its operational commitments could best be assured if a member serving a civilian court ordered sentence during liberty hours is made available for duty at all times, and not merely for emergency situations. Availability for duty at all times is furthermore a fundamental part of the member's military obligation and a necessary condition for his entitlement to pay and allowances to remain in effect. The material to be added to the Personnel Manual should specify that the civil authorities must return the member when requested to do so by the Coast Guard.

G-LGL memo 1000 of 16 Jul 1985

RECOVERY OF MEDICAL EXPENSES OF MEMBER INJURED DUE TO OWN MISCONDUCT

The Chief, Office of Health Services asked whether the Coast Guard can recover the reasonable cost of medical care provided to an active duty member when it has been administratively determined that the injury or disease was due to the member's own misconduct. The possibility of recovery under two sources, the Federal Medical Care Recovery Act (FMCRA), 42 USC § 2651 et seq., and the medical entitlement statutes were raised. In this memo we will discuss why the Coast Guard cannot recover these expenses under either source, beginning with the FMCRA.

The FMCRA provides for the recovery of medical costs expended by the government "under circumstances creating a tort liability upon some third person . . .." 42 USC § 2651. The basis of tort liability is that an individual suffering injury to either person or property may recover if the injury was caused by another person negligently violating a duty recognized in law. Once liability is established, the question is then what portions of the person's injuries or losses will be compensated. The FMCRA allows the government to recover medical costs expended as a compensable element of damages only if tort liability is established. It goes without question that a person cannot be liable to him or herself. It is also without question that Congress made no attempt to create novel nuances to traditional tort concepts that would somehow make the injured person liable for medical expenses under this statute. Therefore, under current FMCRA language, no recovery is available from a military member for injury due to his or her own misconduct.

With regard to recovery of these expenses under the medical entitlement statutes, the Chief Counsel had previously determined that the Coast Guard could not do so. 395 L.B. 12 (1971). That determination was based on the federal statute relating to the entitlement of Coast Guard members to medical care provided by the Public Health Service (42 USC § 253) and the regulations of the Department of Health, Education and Welfare which implemented that statute. The Chief Counsel concluded that since neither the statute nor the regulations made any provision for the recovery of these expenses, the Coast Guard could not recover them. Despite the fact that the Coast Guard is now authorized to administer its own health

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care program, we are still of the opinion that the Coast Guard cannot recover these expenses under the medical entitlement statutes; our opinion is based on the existence of several provisions in the medical entitlement statutes which permit the recovery of expenses in certain situations.

The health care program for active duty Coast Guard members is a part of the "uniform program of medical and dental care for members" of the uniformed services which is outlined in 10 USC Chapter 55. 10 USC § 1071. Under Chapter 55, active duty members of uniformed services are entitled to health care in any facility of any uniformed service. 10 USC § 1074(a). Although Chapter 55 provides that members are entitled to health care, it does not specifically provide that the uniformed service to which a member belongs is responsible for the expenses of providing the member's health care. In other words, standing alone, 10 USC § 1074(a) could be interpreted to mean that, while members are entitled to health care, they are not necessarily entitled to receive that health care at no cost to themselves. Title 10 USC § 1074(a) cannot be interpreted in isolation from the remainder of Chapter 55, however.

Chapter 55 contains several provisions which provide for recovering some or all of the expenses of providing health care to members, former members, and dependents in certain situations. These are as follows:

a. 10 USC §§ 1075 and 1078 - subsistence charges for officers and former officers and for enlisted members who are entitled to basic allowance for subsistence;

b. 10 USC § 1078(a) - mandatory charges for inpatient medical and dental care given to dependents;

c. 10 USC § 1078(b) - optional charges for outpatient medical and dental care given to dependents; and,

d. 10 USC § 1085 - requiring executive departments whose members and former members receive medical or dental care from a facility under the jurisdiction of another executive department to reimburse that department for the care provided.

The fact that Congress specifically provided for the recovery of expenses in certain situations not once, but several times, in Chapter 55 strongly implies that had Congress intended for there to be recovery of expenses in other situations, it would have provided for these as well. Therefore, since Congress did not provide for the recovery of the expenses of medical care provided to members who were injured due to their own misconduct, the Coast Guard cannot recover these expenses. These same four provisions also provide another argument against the Coast Guard's recovering these expenses.

All four of the provisions which provide for the recovery of expenses also provide that the amounts received shall be credited to the appropriation supporting the facility which furnished the care. See 10 USC §§ 1078(c) and 1085. Thus, in situations in which a

Coast Guard facility furnished one of the types of care listed above, the amounts received for that care would be credited to the Coast Guard's OE appropriation and could be used by the Coast Guard for additional operational and maintenance expenses. Since there is no provision which authorizes the Coast Guard to recover the expenses of health care provided to members who were injured due to their own misconduct, there is also no provision which authorizes the Coast Guard to credit any amounts it might recover for these expenses to its OE appropriation. In the absence of specific statutory authority to credit the amounts collected to its own appropriations, the Coast Guard would have to deposit these amounts into the general fund ("miscellaneous receipts") of the Treasury. United States General Accounting Office, Office of the General Counsel, Principles of Federal Appropriations Law, 5-62 through 5-68 (1st ed. 1982). Thus, even if the Coast Guard could successfully argue that it could recover these expenses, it could not use the amounts it collected. Therefore, if recovering the expenses of the health care provided to members who were injured due to their own misconduct were to be done, it would require a change in the law.

G-LGL memo 5800 of 5 Aug 1985

UNAUTHORIZED USE OF THE WORDS "COAST GUARD" IN PROMOTIONAL MATERIALS

Chief, Consumer Affairs Staff requested advice on whether two boat promotional brochures violate 14 USC 639. It is my opinion that these promotional materials use the words "Coast Guard" without authority and therefore violate 14 USC 639. I recommend that the manufacturers of the boats and the distributors of the VICON material be advised to cease using the words "Coast Guard" until they receive proper authority to do so.

The first sentence of 14 USC 639 prohibits any use of the words "Coast Guard" etc. in promotional material without the permission of the Commandant. In essence, the right to use our name belongs solely to us and even if one has a Coast Guard approved product they cannot use our name without permission. The second sentence of 14 USC 639 prohibits falsely advertising that a product is endorsed, authorized, or approved by the Coast Guard. The application of these provisions to the promotional materials is discussed below.

Shamrock 20. This brochure has a page headed with the words "U.S. Coast Guard" flanked by racing stripes containing the Coast Guard emblem. The text details how the Coast Guard tested the boat and quotes a BMCS involved in the testing. Three photographs of the vessel with Coast Guard markings are on the page. There is also a reference to a Coast Guard News Release which is no longer available within the Coast Guard. There can be no question that Shamrock is using the fact that we tested their boat for our own use, and liked it, for their own commercial purposes. Their brochure violates both aspects of 14 USC 639. Even if everything they say is true and not misleading, their use of the words "Coast Guard" is prohibited unless authorized. The text combines unattributed statements with

quotes by a BMCS. The unattributed statements draw conclusions as to the fitness of the Shamrock 20 for particular situations. The copy implies these conclusions are those of the Coast Guard. Without reading the Coast Guard News Release, I cannot conclusively determine the truth of the advertising. However, the mere fact that the Coast Guard has tested and even buys and uses a product can be misleading and prohibited under the second sentence of 14 USC 639. Our personnel are professional, trained mariners who can safely use boats and equipment too complicated for recreational boaters. For example: few of our boats could be certificated to carry passengers; most of our boats do not meet the reserve buoyancy standards required for recreational vessels; and, the life jackets we use are too complicated to be approved for sale to the public. Shamrock is falsely implying that we have "endorsed, authorized, or approved" their 20 foot vessel. There is no evidence that we have done so and the BMCS quoted likely does not have such authority. You may advise Shamrock accordingly.

VICON Pneumatic Boat. The material mailed by the Priority Message Express Service Center states the VICON boat "conforms to the U.S. Coast Guard hull identification system." As with the Shamrock 20, I doubt we have authorized the use of the words "Coast Guard." More importantly, the language used does falsely imply Coast Guard approval of the VICON boat. We have received one complaint that stated the sender thought the language implied "Coast Guard approval/sanction of the seaworthiness of this craft." The hull identification numbering system merely assigns a number to a boat and does not require or include any testing, certification or approval, etc. Therefore, the language in the prize notification, although arguably true, misleads the public into believing the Coast Guard has approved the VICON boat. You should advise the Priority Message Center, VICON, and the involved resorts of these violations of 14 USC 639.

In any correspondence outside the Coast Guard, you should not reveal the name and address of the complainants. That information need not be released pursuant to exemptions (b)(6) and (b)(7) of the Freedom of Information Act. Please contact this Division, if you receive a request for this information.

G-LGL memo 5800 of 23 Oct 1985

USE OF EXEMPTION 3 IN PROCESSING FREEDOM OF INFORMATION ACT REQUESTS

The General Counsel, Department of Transportation, furnished guidance on the use of exemption 3 in processing Freedom of Information Act (FOIA) requests for distribution to offices with FOIA responsibilities. Exemption 3 of the FOIA, as found in 5 USC 552(b)(3), permits the withholding of matters "specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld."

Accompanying the General Counsel's memorandum is a list of statutes administered by the Department which may be invoked in withholding information under exemption 3. Those pertinent to the Coast Guard include 46 USC 3315(b), protecting the source of information on vessel defects and imperfections, 46 USC 7319, protecting the contents of merchant mariner's documents, 46 USC 10311(d), protecting records of discharge of merchant seamen, and 46 USC 6102, protecting State boating safety accident reports. Also accompanying the General Counsel's memorandum is correspondence with a member of Congress which reveals that 46 USC 1'308 may not be invoked to protect information under exemption 3. That section, formerly codified at 46 USC 1473, permits a vessel numbering authority to release vessel numbering and registration information when the authority is satisfied that the request is reasonable and related to boating safety purposes. The congressman found this language to be too vague to qualify the statute as a basis for asserting exemption 3. The General Counsel concurred in this analysis.

The General Counsel has also expressed the opinion that the Privacy Act, 5 USC 552a, may not be asserted at this time as a basis for withholding information under exemption 3. This issue is now before the Supreme Court. Likewise, the Trade Secrets Act, 18 USC 1905, may not be used to withhold information under exemption 3. Additionally, a regulation other than one that implements a statute authorizing the withholding of information, may not be used to withhold information under exemption 3, as the exemption applies only to material protected by statute.

G-LGL ltr 5720 of 14 Nov 1985

STATUS OF THE AUXILIARY AS AN AGENCY FOR THE PURPOSES OF OMB CIRCULAR A-19

A legal opinion was requested concerning the status of the Coast Guard Auxiliary as an "agency" subject to OMB Circular A-19, which governs clearance of statements to be made at Congressional hearings.

The argument that the Auxiliary is an agency for the purposes of OMB Circular A-19 is based on the Auxiliary's close association with the Coast Guard. The Auxiliary is a nonmilitary organization administered by the Commandant which was established to assist the Coast Guard in carrying out a number of its missions, particularly its boating safety mission. 14 USC §§ 821, 822. Toward this end the Auxiliary conducts public education programs, courtesy marine examinations, search and rescue patrols, etc.; indeed, a sizeable portion of the Coast Guard's boating safety responsibilities are carried out by the Auxiliary under the direction and administration of the Coast Guard.

In carrying out these activities in support of the Coast Guard, the Auxiliary is supported, in part, with federal funds. For example, Coast Guard appropriated funds are available to reimburse certain

expenses of Auxiliarists who are assigned to certain duties, 14 USC §§ 830, 831, and Auxiliarists who are injured in the line of duty are entitled to certain medical benefits, 14 USC § 832. In addition, their vessels and aircraft are protected as public vessels of the United States. 14 USC §§ 827, 828. Finally, Coast Guard appropriated funds are generally available to support the activities of the Auxiliary. 14 USC § 894. Thus, the Auxiliary is an organization which was created by federal statute to carry out federal functions with federal support under the direction of a federal agency; as such, there is a reasonable basis for concluding that the Auxiliary is "an establishment of the Government" for the purposes of OMB Circular A-19.

The argument that the Auxiliary is not an agency for the purposes of OMB Circular is based on the Auxiliary's somewhat unique dual nature, i.e., while the Auxiliary often appears to be nothing more than a Coast Guard instrumentality, it must be remembered that it is actually an organization of private citizens who are donating their services to the Government. This dual nature is reflected in 14 USC Chapter 23. While the Auxiliary was established to assist the Coast Guard, Auxiliarists are not vested with any rights, privileges, powers, or authority solely by reason of membership in the Auxiliary. 14 USC § 831. Instead, they are vested with the powers and authority of Coast Guard members only when the Coast Guard assigns them to specific duties. Id. Similarly, they are only eligible for reimbursement of their expenses and for the other financial support previously mentioned when they are assigned to these duties. Id.; 14 USC §§ 827, 828, 830, 832. Thus, while Auxiliarists are always members of the Auxiliary, they only act on behalf of the Government on certain specific occasions. Therefore, there is also a reasonable basis for concluding that, while the Auxiliary was established by the Government, it is not an "establishment of the Government", but rather is an organization of private citizens who donate their services to the Government on certain specific occasions.

The better argument is that the Auxiliary is an "establishment of the Government" for the purposes of OMB Circular A-19, however. The issues which the testimony is expected to address concern the Auxiliary's activities on behalf of the Coast Guard, e.g., the portion of the Coast Guard's budget which is programmed for support of Auxiliary operations, the Auxiliary's role in the non-emergency SAR policy, etc. Reference (b). Since these issues involve the Auxiliary in its role as an organization exercising federal authority and carrying out federal functions with federal financial support, the Auxiliary should be considered to be a federal agency for the purposes of OMB Circular A-19.

G-LGL memo 16790 of 21 Feb 1986

COAST GUARD RESPONSIBILITY FOR ENVIRONMENTAL DOCUMENTATION FOR BRIDGE PROJECTS

The Chief, Bridge Administration Division asked if the Coast Guard can allow an applicant for a bridge permit to expedite a project by submitting its own environmental documentation.

To begin with, the Coast Guard is ultimately responsible for ensuring that the appropriate environmental documentation is prepared for bridge projects. See, e.g., 42 USC § 4332(2)(C); 40 CFR Parts 1500-08. However, the Coast Guard does not necessarily have to prepare the documentation itself or contract for its preparation; it may, under appropriate circumstances, use environmental documentation prepared by other sources. These circumstances are as follows:

a. The Coast Guard may adopt environmental documentation prepared by other federal agencies, provided it is satisfied that it meets the appropriate standards. See 40 CFR § 1506.3; "National Environmental Policy Act Implementing Procedures", COMDTINST M16475.1B, para. 3.D.4.; "Bridge Administration Manual", COMDTINST M16590.5, para. 2.C.3.

b. The Coast Guard may act as a joint lead agency with other federal agencies or with state and local agencies and use environmental documentation which is prepared jointly by these agencies. See 40 CFR §§ 1501.5(b), 1506.2; DOT Order 5610.1C, para. 6.b.

c. The Coast Guard may use environmental information submitted by applicants to assist it in preparing environmental documentation. See 40 CFR § 1506.5(a).

d. The Coast Guard may use environmental assessments prepared by applicants. See 40 CFR § 1506.5(b).

e. Finally, and most significant for your purposes, the Coast Guard may select a contractor whom the applicant pays to prepare an EIS for the project. See 40 CFR § 1506.5(c); the Council on Environmental Quality [CEQ] Questions and Answers On National Environmental Policy Act Regulations, question no. 16, "Third Party Contracts", 46 Fed. Reg. 18026, 18031 (23 March 1981). The Federal Acquisition Regulations do not apply to this situation because the Coast Guard is not a party to the contract; it is between the applicant and the preparer of the EIS. Note that the Coast Guard cannot adopt an EIS prepared directly by an applicant; the CEQ's regulations clearly state that an EIS must be prepared either by the agency or by a contractor selected by the agency. 40 CFR § 1506.6(c).

All of the above measures are available for expediting the approval process for Coast Guard bridge projects. Remember, the Coast Guard is still ultimately responsible for ensuring the adequacy of the environmental documentation, even if it permits an applicant to use one of these measures to expedite the approval process.

G-LGL memo 16590 of 9 Jan 1986

LOAD LINE EXEMPTION AUTHORITY FOR CARGO BARGES

The Coast Guard does not have the statutory authority to exempt a freight barge from the requirement to have a load line. However, the Coast Guard does have the statutory authority to exempt such a barge from specific provisions of the load line regulations. The statute contemplates that every vessel subject to the statute will have a load line. The statute does provide flexibility in the specific standards to be applied to each vessel. The statutory language on this point: "In establishing such load lines due consideration shall be given to, and differentials made for, the various types and character of vessels and the trades in which they are engaged." This language is unchanged since original enactment in 1935.

The Coast Guard does have some authority under the existing regulations to exempt such a barge from specific provisions. 46 CFR 42.03-30 and 45.15 are limited exemption provisions. 46 CFR 42.03-20, Equivalents, provides another avenue for deviations from specific provisions.

Additional regulations could be issued providing a separate scheme for the barges in question.

G-LMI memo 3400 of 12 June 1984

Editor's Note: Statutory authority to exempt certain vessels operating on the Great Lakes was provided by Congress in October 1984, in Pub. L. No. 98-557, 98 Stat. 2875

CIVIL PENALTY - FAILURE TO REPORT INOPERATIVE NAVIGATIONAL EQUIPMENT

A civil penalty was assessed against a vessel owner for violation of 33 CFR 164.53(b), failure to report an inoperative depth sounder. In determining there was no violation, the Commandant stated:

33 CFR 164.53 applies to vessels operating on navigable waters of the United States. The party submitted evidence tending to show that the Captain of the Port was notified [of the inoperative equipment] at 2146Z and the vessel expected to arrive at the pilot station at 2400R. This suggests that notification occurred before the vessel entered U.S. waters. If so, there is no violation.

G-LMI ltr 16600/7 of 26 July 1984

AUTHORITY TO ASSESS CIVIL PENALTIES AGAINST VESSELS IN REM

An opinion was requested concerning whether the Hearing Officer has the authority to assess civil penalties against vessels in rem.

I agree that such penalties are authorized by 33 USC 1208(b), 33 USC 1608(b), 46 USC 3504(c), 46 App. USC 77, 46 App. USC 83j, and 46 App. USC 319], and also by the Inland Navigational Rules Act of 1980, 33 USC 2072(b).

33 CFR 1.07 is intended to assign to a hearing officer authority to assess civil penalties for any violations of Coast Guard administered statutes. To the extent a statute authorizes a civil penalty directly against a vessel, the hearing officer is empowered to assess that penalty.

The crux of 33 CFR 1.07 is to provide notice and an opportunity to be heard before a civil penalty is assessed. The word "party" should be read as referring to the appropriate person to receive notice of a violation. The appropriate person for an in rem case is the owner. By giving that person notice, the vessel is provided notice of the violation, and all other rights accorded by 33 CFR 1.07. A vessel is not in a position to object to assessment of a penalty when its owner, on its behalf, has been afforded notice and an opportunity to be heard.

The owner concept could be divided into legal and equitable owners as well as owner pro hac vice (bareboat charterer), but it is legally sufficient for us to rely on the owner of record (registered owner). Addition of another party under 33 CFR 1.07-20(c) is not precluded, of course.

G-LMI memo 16200 of 30 July 1984.

SELF-CERTIFICATION OF OFFSHORE SUPPLY VESSEL MID-PERIOD EXAMINATIONS

An opinion was requested concerning the authority to delegate reinspection authority to licensed officers or other vessel owner representatives.

The authority to conduct examinations between inspections for certification is contained at 46 USC 3308(1). Under this section "...the Secretary shall examine ... each vessel subject to inspection at proper times...." Although we have discretion to determine when is the proper time for an examination, our regulations at 46 CFR 91.27 mandate that vessels shall be reinspected at least once during the period of a two-year certificate. Reading the statute and the regulations together, the Secretary shall examine vessels between 10 and 14 months after a certificate of inspection is issued.

Congress provided in 46 USC 2105(a) that the Secretary may delegate duties and powers to members of the Coast Guard and provide for the [re]delegation of those duties and powers. On its face, 46 USC 2104

might appear to be broad enough to allow delegation to non-government personnel. However, the Coast Guard has never delegated the power to make qualitative judgments to any private party. This historical interpretation was confirmed by Congress in 1981 when it specifically authorized the Coast Guard to delegate inspection authority to the American Bureau of Shipping. Coast Guard Authorization Act of 1982, section 8, Pub. L. 97-136, unofficially codified at 46 USC 9 [and officially] codified at 46 USC 3316. The fact that Congress found it necessary to grant this authority indicates that in 1981 there was likely no authority to delegate inspection duties outside of the government. The current law may be similarly interpreted. Although 46 USC 2104(a) may seem to create a broad general power to delegate inspection duties, the specific delegation authority in 46 USC 3316 limits how generously §2104 may be construed. The existence of the limiting statute, 46 USC 3316, implies that all other delegations must be specifically authorized by some other statute. The Secretary may delegate inspection duties only to the Coast Guard, Customs Service personnel, ABS or a similar classification society.

G-LMI memo 16711 of 7 Sept 1984

PASSENGERS FOR HIRE - "GUEST"

An opinion was requested concerning whether a vessel would be considered by the Coast Guard to be "carrying passengers for hire" in a situation involving the carriage of "guests" by a non-profit bareboat charterer of the vessel.

My understanding of the current operation of the vessel is as follows: The vessel, of 163 gross tons, is owned by a non-profit, charitable foundation and is periodically bareboat chartered to other non-profit charitable organizations. These charterers use the vessel to entertain two types of guests: sympathizers or contributors and others active in common areas of interest. The vessel is documented as a pleasure vessel. Because of its construction, the vessel apparently cannot meet Coast Guard passenger vessel inspection requirements.

Under 46 USC 2101(21)(A), a passenger on a passenger vessel is any individual except the master or a crewmember. A passenger vessel is subject to Coast Guard inspection. (46 USC 3301.) A passenger vessel is a vessel of at least 100 gross tons carrying at least one passenger for hire. (46 USC 2101(22).) "Carrying passengers for hire" is defined at 46 CFR 70.10-3 as "the carriage of any person or persons by a vessel for a valuable consideration, whether directly or indirectly flowing to the owner, charterer, operator, agent or any other person interested in the vessel.

Without question, the individuals carried on board the vessel are passengers within the meaning of 46 USC 2101(21)(A).

The question becomes whether the vessel is a "passenger vessel" as defined above. This turns on whether the passengers are carried for hire. The key element is "consideration."

The Coast Guard broadly construes the concept of consideration. It involves a bargained for exchange, the result of which is the entitlement to the transportation. Consideration may be involved even if the vessel is not operated for profit. A "fee" can be paid directly or through donations, and the fee need not represent a fair share of the vessel's operating costs. Vessel inspection laws are also interpreted broadly by both the Coast Guard and the federal courts so as to favor finding their requirements applicable over the widest permissible range of cases and circumstances. This broad construction is necessary to accomplish the primary purpose of the vessel inspection laws - safety.

In the situation you have described, two groups of passengers are invited - past contributors and others interested in the organization's goals, and persons active in areas of common interest. With respect to the latter, so long as no consideration flows in the form of services to the organization in exchange for transportation, my opinion is that they are not passengers for hire. The past contributors, however, cause me concern. You have stated that contributions are in no way linked to an invitation aboard the vessel and that there is no bargained for exchange between guests and the chartering organization. It appears, however, that the primary invitees aboard the vessel come from a select group - those who have given money to the organization. Eligibility for transportation, then, for those who are "interested in the goals of organization," or "active in areas of interest to the chartering group," depends on past contributions. This gives rise to a concern that one or more of the passengers expects to be carried on the vessel in exchange for the contribution.

Consequently, whether a particular individual is a passenger for hire is a question of fact which will depend upon the interpersonal relationship between the parties involved. As noted above, entitlement to transportation is a key factor in the Coast Guard's determination of whether a passenger is a passenger for hire. We would thus look very closely at the expectations of the parties. Recognizing that the factors involved are highly factually dependent, I cannot say that the vessel, based upon your representations alone, would or would not be considered to be carrying passengers for hire. A decision would necessarily involve an examination of the factual setting of the particular voyage.

G-LMI memo 16722 of 28 September 1984

CIVIL PENALTY - DUE PROCESS

A civil penalty was assessed against a restaurant owner for violation of 33 USC 1321(b)(3), discharge of oil into navigable waters. In affirming the penalty the Commandant stated:

Your assertion that the refusal to hold an informal hearing in [the town where the restaurant is located] is a violation of due process is untenable. The Hearing Officer followed the provisions of 33 CFR

1.07. These procedures have been upheld in federal courts even when its provisions were less detailed than they now are. See United States v. Independent Bulk Transport, Inc., 480 F.Supp 474 (S.D.N.Y. 1979). Due process requires that you be afforded an opportunity to present arguments and evidence in your favor. This right was not denied you. The Hearing Officer scheduled a hearing for you in [the district office] and informed you of your right of submit written evidence in lieu of an informal hearing. In fact, the Hearing Officer extended you the opportunity of having your witnesses present their testimony via telephone or deposition. The Hearing Officer was more than reasonable in his attempts to assist you in the presentation of your case. He did not abuse his discretion in refusing to hold the hearing in [the town where the restaurant is located].

When there is more than one owner, the Coast Guard may proceed against any one of them. As one of the owners of the facility you are a proper party against whom action could be taken. As to third parties as well as your partners, it is not the Coast Guard's function to determine the rights you may have against other parties who may have some liability arising from the incident.

G-LMI ltr 16460/17 of 30 October 1984

CERTIFICATE CANCELLATION, LOAD LINE

The Chief Counsel was asked for an opinion concerning the authority of the American Bureau of Shipping (ABS) to withdraw, revoke or cancel a load line certificate which ABS has issued to a vessel. Of specific interest is whether ABS is considered "proper U.S. authority" under 46 CFR 42.07-55(a) to cancel a load line certificate.

The regulations do not define "proper U.S. authority." Our research indicates the phrase does not appear elsewhere in Coast Guard regulations. While a grant of authority to issue generally implies authority to withdraw, it is my opinion, for the reasons discussed below, that ABS is without authority to cancel a load line certificate once it has been issued.

By regulation (46 CFR 42.07-35), the Commandant has appointed ABS as the prime load line assigning and issuing authority, under the statutory authority of the International Voyage Load Line Act of 1973 (46 App. USC 86d) and the Coastwise Load Line Act (46 App. USC 88b). ABS is required to send a copy of all load line certificates to the Commandant (46 CFR 42.07-35(f)). There is no express statutory or regulatory grant of cancellation authority to ABS, nor is there any guidance concerning actions required if ABS sought to cancel a certificate. Thus, if ABS had authority to cancel a load line certificate, it could do so without being required to notify the Coast Guard - an obviously undesirable situation.

The load line certificate model forms for International Load Line Certificate (46 CFR 42.50-5) and Coastwise Load Line Certificate (46

CFR 42.50-15) provide that the certificate may be cancelled "by the Commandant of the Coast Guard" for reasons essentially identical to those specified in 46 CFR 42.07-55.

This interpretation of the regulations is not unique to load lines. ABS issues other certificates under authority received from the Coast Guard (See 46 CFR 31.40-45, 91.60-45 and 189.60-45) where authority to withdraw, revoke or suspend the certificate is expressly reserved by the Coast Guard, after notification by ABS of a discrepancy.

This interpretation is also consistent with normal practice wherein ABS makes initial and periodic surveys to insure that the vessel is in compliance with applicable requirements, while load line enforcement is primarily the responsibility of the Coast Guard. The statutory regime appears to contemplate detention of a vessel by the Coast Guard, upon "reason to believe" that the vessel is not in compliance with load line requirements (46 App. USC 86h and 46 App. USC 88f) for re-survey by ABS. This "reason to believe" could come from information received from ABS. Further, ABS retains the authority under 46 CFR 42.09-15(d) to refuse to endorse a load line certificate if, during an annual survey, it finds unsatisfactory conditions aboard the vessel.

G-LMI memo 16711 of 8 November 1984

UNION AGREEMENT TO HAVE ITS MEMBERSHIP WORK IN EXCESS OF 8 HOURS

Can a collective bargaining agreement which provides that union members will work, at the master's discretion, more than 8 hours a day waive a seaman's statutory right not to be required to work more than 8 hours a day?

The best answer is that a collective bargaining agreement cannot waive the seaman's right under 46 USC 8104(d).

Coast Guard Law Bulletin 367 (1966), at page 1, concluded that the right could not be waived by a collective bargaining agreement. Two theories support this conclusion.

First, where Congress has intended that a collective bargaining agreement override a statutory right of this type, it has expressly so provided. The Fair Labor Standards Act provides that no employer shall employ any employee for a workweek longer than 40 hours unless the employee receives overtime compensation. The Act also states, however, that this provision does not apply where a collective bargaining agreement provides otherwise so long as the agreement also provides that no employee shall be employed more than 1040 hours during any 26 consecutive week period. 29 USC 207(a) and (b). Interestingly, the wage and hour provisions of the Act do not apply to seamen. 29 USC 213(b)(6). The parallel provision (predating the Fair Labor Standards Act) of former 46 USC 673 (now 46 USC 8104(d)) contains no express recognition of a collective

bargaining agreement (Congress could have amended former 46 USC 673) and, accordingly, the right provided therein must be considered to be a personal right that can only be waived by the individual seaman.

Second, although there do not appear to be any reported court decisions on point, there is a decision [from] which an analogy can be drawn. In U.S. Bulk Carriers, Inc. v. Arguelles, 400 U.S. 351, 91 S.Ct. 409 (1971), the Court concluded that a seaman did not give up his right to sue for wages directly in federal court under former 46 USC 596, without going through arbitration measures established in the collective bargaining agreement. The rationale for this result was the strong public policy established by Congress that gave seamen certain rights, recognizing the unique nature of maritime service.

> We can find no suggestion in the legislative history of the Labor Management Relations Act of 1947 that grievance procedures and arbitration were to take the place of the old shipping commissioners or to assume part or all of the roles served by the federal courts protective of the rights of seamen since 1790. 400 U.S. at 357, 91 S.Ct. at 412.

This same philosophy would seem to pertain to hours of work. There is a strong safety purpose in not forcing a seaman to work more than 8 hours a day. The protection is explicit and has not been expressly replaced by the Labor Management Relations Act, the Fair Labor Standards Act, or any other statute. To allow this right to be waived by a union in which the individual seaman may have had no real opportunity to object would appear to be contrary to the Congressional purpose in limiting the hours of work aboard ship.

G-LMI memo 16712 of 9 November 1984

USE OF SHIPS BOATS AS LAUNCHES

An opinion was requested concerning the use of lifeboats from a Panamanian cruise ship to transport passengers to and from the anchored vessel.

My understanding of the operation of this vessel is that, when it calls at the port of Key West, Florida, it does not dock, but anchors some distance from the shore, and, using its lifeboats, ferries passengers between the ship and the shore. Presumably, the lifeboats are uninspected. For the reasons discussed below, it is my opinion that such use of a vessel's lifeboats is a violation of U.S. law, and is contrary to the provisions of the International Convention for the Safety of Life at Sea, 1974.

Clearly, the use of the lifeboats as described constitutes the carriage of passengers for hire. 46 CFR 70.10-5, 24.10-3, 175.10-28. Depending on size and the number of passengers carried, they would likely be categorized as small passenger vessels or uninspected vessels. This creates two obstacles. First, small passenger vessels are subject to inspection under 46 USC 3301.

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Second, and perhaps more difficult to overcome, operators licensed by the Secretary are required. (46 USC 8902.) There is no exemption which would allow these vessels to operate without inspection or without licensed operators. If the lifeboats carried less than six passengers, inspection would not be required. However, the vessel would still be required to meet the requirements of 46 CFR Subchapter C, and be operated by a licensed operator. (46 USC 8903.)

Using the lifeboats to transport passengers [practically speaking] would render them unavailable as lifeboats. SOLAS 74 requires that lifeboats be available for use before the ship leaves port and at all times during the voyage. The stated purpose of the SOLAS 74 provision is "that they shall be readily available in case of emergency." This language is unchanged from SOLAS 48. This purpose could not be achieved if the ship's lifeboats were deployed elsewhere. Recent fires aboard cruise ships underscore the importance of insuring the availability of lifesaving equipment, including lifeboats.

G-LMI memo 16700 of 3 December 1984

CIVIL PENALTY - SEPARATE VIOLATIONS

Civil penalties were assessed for the following violations:

Regulation	Nature of Violation	Assessed Penalty
49 CFR 176.30(a)(3)	Proper shipping name not used in Dangerous Cargo Manifest (DCM).	$ 500
49 CFR 176.30(a)(7)	Stowage not shown on DCM.	$5,000

In determining that only one violation had occurred, the Commandant stated:

By separately stating violations of 176.30(a)(3) and (a)(7), the Hearing Officer implied that two violations of 49 CFR 176.30(a) existed. Failure to comply with 176.30(a) results in one violation even when there is more than one deficiency in the dangerous cargo manifest. A Hearing Officer may, of course, assess a higher penalty for a dangerous cargo manifest having many deficiencies than one having few. In this case, the Hearing Officer has made it clear which of the deficiencies he considered to be the more serious. Since the total assessed for violation of §176.30(a) was $5,500, considerably less than the $10,000 maximum, I find no prejudice.

G-LMI ltr 16616/3 of 7 December 1984

CIVIL PENALTY - NEGLIGENT OPERATION

In remanding a civil penalty case to the hearing Officer, the Commandant stated:

The Hearing Officer must make written findings setting forth what behavior was negligent. Such findings are particularly important in a negligence case where, as here, the report of violation presents a lengthy course of conduct or more than one specific act that could be considered negligent. The party has a right to know what he is found to have done wrong.

G-LMI ltr 16731/7 of 7 December 1984

CIVIL PENALTY - VESSEL OPERATOR

A civil penalty was assessed against the alleged operator of a tank barge for violation of 33 USC 1321(b)(3), discharge of oil into navigable waters.

The case was remanded to the Hearing Officer because there was no evidence that the company against whom the penalty was assessed was the operator of the vessel. The Commandant stated:

To be the operator, the company must have had operational, business, or physical control of the barge. The fact that the company employed the tankerman is not enough, by itself, to establish the company control. If it is thought that the company was the person in charge, again, the company must have been responsible for the operation of the vessel. Operation or operational control may refer to offloading the barge, but if the company is engaged only in providing labor, the company does not have control.

G-LMI memo 3400 of 12 June 1984

SOLAS 74, INTERNATIONAL VOYAGE TO OCS

"If a foreign documented self-propelled drillship of greater than 500 gross tons departs a foreign country, proceeds directly to the U.S. OCS and commences drilling operations, has the unit made an international voyage as defined by SOLAS 74?"

The answer is no.

Regulation 2(d) of Chapter I of SOLAS 74 defines "international voyage" as a voyage from a country to which the present Convention applies to a port outside such country, or conversely." The issue is whether the arrival of the foreign flag drillship at its drilling location is arrival at a port of the United States. The only analogous situation providing guidance concerns whether the location on the OCS is a port or place for purposes of the coastwise trade laws. Under Treasury Decision 54281, until the drillship attaches itself to the U.S. OCS, a port or place for purposes of the coastwise trade laws has not existed.

Under the rationale used in the Treasury Decision, the voyage described in paragraph 1 is not an international voyage, since no port or place exists until the drillship is on station and engaged in drilling operations. Once so engaged, a voyage between a foreign port and the rig would be an international voyage under SOLAS 74.

G-LMI 16700 of 27 December 1984

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MANNING REQUIREMENTS FOR UNINSPECTED VESSELS

An opinion was requested concerning the applicability of 46 USC 8104(d), the three watch rule, to uninspected towing vessels.

The three watch system does not apply to uninspected towing vessels under the direction and control of operators and not subject to the provisions of 46 USC 8304 (implementing the Officer's Competency Certificates Convention).

The premise of the Title 46 Codification was that there be no substantive changes of a controversial nature. However, many changes were made to the law, and the codifiers also stated that due to the comprehensive review of drafts of the bill by all interested parties, if a change was made and not objected to, it should be presumed that the change was intended and noncontroversial. If the latter rule is applied indiscriminately, substantial, adverse, unintended results can occur. In some instances these two principles compete. One of these instances is the controversy over whether the three watch rule applies to uninspected towing vessels.

The genesis of the problem is that at the latest stage of the law's development, the word "individual" was frequently substituted (not less than 35 times) for "officer," "operator," or "person." The Committee stated that it used the term "operator" when referring to a licensed operator and the term "individual" when referring to an individual operating a vessel. H.Rep. 338, 98th Cong., 1st Sess., at page 122. However, "operator" is used alone in only 4 instances, and in one, 46 USC 4308, the use is inconsistent with the Committee's explanation. It appears that the substitution of "individual" was made at the behest of the Law Revision Counsel, which was concerned with technical drafting style and not with effecting unintended substantive changes.

A literal reading of 46 USC 8104, as noted in reference (a), could lead one to conclude that the three watch rule applies. However, further consideration reveals that there are indeed ambiguities within 46 USC 8104 which preclude the blind application of the plain meaning rule. For instance, if one assumes that "individuals" includes "operators," 8104(d) could be read to mean that operators of uninspected towing vessels cannot be required to work more than 8 hours a day. However, 8104(h) precludes them from working more than 12 hours. Which controls? If 8104(d) applies to "operators," should the 8104(f) emergency authority, currently limited to a master or other "officer," include operators? What is the relationship between 8104(g) and 8104(h)? The section by section analysis of this section in the House Report only further confuses the issue. For example, it confuses "may not be required to work" and "may not work." Therefore, the section by section analysis offers no solace.

In view of the ambiguity created within 46 USC 8104, it becomes necessary to examine other sources to ascertain the true meaning of this law. The primary source is former 46 USC 673 and 405(b). Those provisions have been interpreted as establishing a two watch system for uninspected towing vessels that did not have "officers." The primary rationale was that 405(b) carved out a special system for uninspected towing vessels. Since 8104(h) is derived from 405(b), and since no explicit intent is expressed that alters this scheme, 8104(h) should also be interpreted as preserving the two watch system for these vessels. Accordingly, it is an exception to 8104(d). Further support for this result can be found by examining the nature of "work" performed by operators on uninspected towing vessels. For the most part, this "work" involves standing watch. Since 12 hours of work is authorized, Congress, being cognizant of the industry practice, must have contemplated the two watch system for these vessels. Also, this approach continues present practice, fulfilling the Congress' objective that the law not be "detrimental to or adversely impact upon the industry governed by those laws ... nor place any greater duties or obligations on any person." (House Report at 119).

G-LMI memo of 1 February 1985

OCCUPATIONAL SAFETY & HEALTH REGULATIONS ON OUTER CONTINENTAL SHELF FACILITIES

An opinion was requested concerning the applicability of regulations promulgated by the Occupational Safety and Health Administration (OSHA) to workplaces on the Outer Continental Shelf (OCS).

It is my opinion that OSHA's general standards apply on the OCS to the extent that they have not been preempted by Coast Guard regulations, and that the Coast Guard has the statutory authority to totally foreclose OSHA with respect to the regulation of safety and health conditions on the OCS. This includes OSHA's proposed rulemaking for oil and gas well drilling. If the Coast Guard chooses not to exercise its authority with respect to a particular working condition, OSHA's standards will continue in effect.

The Occupational Safety and Health Act of 1970, 29 USC 651, et seq. applies to employment performed in a workplace on OCS lands. 29 USC 653(a). the act does not apply, however, to working conditions of employees with respect to which other federal agencies exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health. 29 USC 653(b)(1). See Southern Pacific Transportation Co. v. Usery, 539 F.2d 385 (5th Cir. 1975); Marshall v. Pool Offshore Co., 467 F.Supp. 978 (E.D. La. 1979). This "exercise" of authority by another agency is discussed below.

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The 1978 amendments to the Outer Continental Shelf Lands Act (OCSLA), 43 USC 1331 et seq. expanded the Coast Guard's role on the OCS by providing the Secretary of the Department in which the Coast Guard is operating with specific authority to "promulgate and enforce regulations or standards applying to unregulated hazardous working conditions related to activities on the Outer Continental Shelf." 43 USC 1347(c). As the court said in Marshall v. Pool Offshore Co., supra.:

> It is clear that Congress recognizes the maritime nature of these operations; the expertise of the Coast Guard in this area is beyond question. 467 F.Supp. 978, 982.

The scope of activities on the OCS" which could come within the Coast Guard's authority had yet to be defined. Enforcement of regulations promulgated under §1347 is specifically delegated to the Secretaries of Interior, Transportation and Army by §1348.

A clear understanding of the Coast Guard's regulatory authority requires that the statutes be read together. The fact that OCSLA gives the Coast Guard authority to prescribe regulations for unregulated hazardous working conditions" does not restrict the Coast Guard only to areas where no OSHA regulations exist. OSHA's regulatory authority, as granted by the Occupational Safety and Health Act of 1970, cited above, ends at the point where other federal agencies exercise authority. This exercise of authority was the subject of a memorandum of understanding between OSHA and the Coast Guard, signed in December 1979. The memorandum of understanding recites the agreement that "(t)he Coast Guard will develop and promulgate necessary regulations to assure safe and healthful working conditions on the OCS. OSHA will continue to promulgate general standards, which may apply to working conditions on the OCS not being regulated by the Coast Guard." OSHA, in a recent Notice of Proposed Rulemaking to regulate oil and gas well drilling generally, recognized the Coast Guard's primary responsibility for the safety and health of employees engaged in OCS operations..." 48 Fed. Reg. 57202 (1983) (to be codified at 29 CFR pt. 1910)(proposed December 28, 1983).

The exercise of preemptory authority must be with respect to a particular "working condition." This term has been held to embrace both "surroundings" such as the general problem of the use of toxic liquids, and physical "hazards" which can be expressed as a location (maintenance shop), a category (machinery) or a specific item (furnace). Southern Pacific Transportation Co. v. Usery, supra. Preemption does not require, however, that the regulations of the other agency be the same or substantially the same as those of OSHA. This was the position urged by OSHA in U.S. Air v. Occupational Safety and Health Review Commission, 689 F.2d 1191 (4th Cir. 1982). OSHA argued that if the regulation adopted and applied by another agency did not deal in the same way with the same "discrete hazard" in the "working environment" as the OSHA regulation, there is no preemption. In rejecting OSHA's argument, the court stated that if it had been the intent of Congress to require the regulations of the other agency to be substantially the

same as OSHA's regulations, there would have been no point in including in the Act an exemption section. The court cited Occupational Safety and Health Review Commission Chairman, Robert D. Moran, who has characterized this position as a "nook-and-cranny" approach which, if followed, would mean that "OSHA realistically never would be exempted from jurisdiction." Note, Southern Railway Co. v. OSHARC & Brennan: Is Dual Coverage Feasible? 3 Detroit C.L.R. 625, 630 (1970).

The applicability of OSHA general standards (29 CFR Part 1910) to activities on the OCS depends upon the exercise of authority under OCSLA by the Coast Guard and the Department of Interior. A general standard is not preempted unless a specific standard sets forth the measures an employer must take to protect employees from a particular hazard. L.R. Wilson & Sons, Inc. v. Donovan, 685 F.2d 664 (D.C. Cir. 1982). In Marshall v. Nichols, 486 F.Supp. 615 (E.D. Tex. 1980), aff'd on other grounds sub nom. Donovan v. Nichols, 646 F.2d 190 (5th Cir. 1981), the U.S. District Court for the Eastern District of Texas considered a suit brought by the Secretary of Labor to enforce an OSHA subpoena. In granting the defendant's motion for summary judgment the court said:

> Actual exercise of authority to govern working conditions by the Coast Guard displaces a potential OSHA jurisdiction over offshore platform working conditions. 485 F. Supp. 615, 619, (citing Clary v. Ocean Drilling and Exploration Co., 609 F.2d 1120 (5th Cir. 1980)).

The court went on to discuss the various regulations promulgated by the Coast Guard, the U.S. Geological Survey and the Interior Department, then stated flatly:

> In enacting the Outer Continental Shelf Lands Act, Congress intended to exclude from OSHA inspection and administrative review the working conditions on offshore drilling platforms. 486 F.Supp. 615, 620 (citing Clary v. ODECO, supra; Southern Pacific Transportation Co. v. Usery, 539 F.2d 386, 390 (5th Cir. 1976), cert. denied, 434 U.S. 874 (1977)).

As you have pointed out, OSHA had recognized that its construction standards (29 CFR Part 1926) do not apply to oil and gas production. The Nichols court failed to find any OSHA regulations pertaining to the oil well drilling industry, and noted that, in attempting to apply its regulations, OSHA was seeking to go beyond the rulemaking authority granted by the Administrative Procedure Act. The court concluded that "the absence of any participation by the oil well drilling industry in promulgation of general construction regulations prevents OSHA from applying such regulations in the present case." 486 F.Supp. 615, 620 (citing U.S. v. Frontier Airlines, 563 F.2d 1008, 1012 (10th Cir. 1977)). The extensive discussion in the preamble to OSHA's NPRM, noted above, is an apparent attempt by OSHA to demonstrate that, unlike the situation in the Nichols case, the industry has participated in the development of the currently proposed standards.

G-LMI Memo 16613 of 11 February 1985

SELF DEFENSE OF MERCHANT SHIPS

The right of a nation or the individuals thereof to take necessary and appropriate action in self-defense is a well-established principle of international law. However, the proper exercise of this right depends upon several variables.

Many situations can be created where a plea of self-defense can be put forward, although in reality it is not justified. Each case must be examined in light of what has actually happened. Rules, definitions and technical terms count for very little, or may even be misleading.

The exercise of the right during peacetime of a merchant vessel to defend itself against an unlawful attack generally requires (1) an unlawful act or potential act must definitely threaten the security of the merchant vessel, and (2) the measures taken to repel the threat must be proportionately reasonable. Therefore, the right must be exercised only as a last resort, and then only to the extent absolutely necessary to accomplish the end required.

The right of self-defense does not apply where force is being legitimately exercised against a merchant vessel. For example, Coast Guard vessels occasionally must resort to use of force to stop vessels avoiding legitimate Coast Guard law enforcement actions. Within areas of national jurisdiction, private vessels do not have the right of self-defense to prevent warships or other duly authorized government vessels from enforcing their laws.

G-LMI memo 5800 of 8 May 1985

FISHING VESSELS - DEFINITION

The Chief Counsel's opinion was requested as to whether a "fishing vessel" as defined in 46 USC 2101(11a) includes a vessel which catches, decapitates, eviscerates, and washes fish, and then places them in 20 kilo waxed cartons which are topped off with fresh water and frozen. The frozen fish are then sold for further processing. They are not sold retail in their frozen form.

The issue centers on whether this freezing process makes the vessel a fish processing vessel as defined in 46 USC 2101(11b). This definition excludes "gutting, decapitating, gilling, skinning, shucking, icing, or brine chilling." The freezing process approximates icing. In view of the legislative history of the Commercial Fishing Industry Vessel Act, I agree that the operation you describe does not make the vessel a fish processing vessel. "'[F]ish processing vessel' is meant to include only those vessels on which extensive processing work is done to prepare either fish or fish products for marketing and not vessels in which incidental or minimal processing takes place as a necessary part of the fishing activity to preserve the quality of the fish." 130 Cong. Rec. page H7230 (daily ed. June 27, 1984) (statement of Rep. Young). See

also 130 Cong. Rec. S8457 (daily ed. June 27, 1984 (statement of Sen. Gorton). Accordingly, the vessel is considered a fishing vessel within the meaning of 46 USC 2101(11a).

[F]ish processing vessels below 1600 gross tons are [not] exempt from the citizenship requirements. 46 USC 8103(b) provides that on each departure of a documented vessel (except a fishing vessel) from a port of the United States, 75% of the seamen on board must be citizens of the United States. Fish processing vessels are not excluded from this section, and the legislative history of the Commercial Fishing Industry Vessel Act does not state an intent to exclude these vessels from the citizenship provisions of the law. Also, note that under 46 USC 8103(a) the licensed officers must also be citizens (licensed officers may be required by the Officers' Competency Certificates Convention (46 USC 8304)).

G-LMI letter 16720 of 9 May 1985

RELEASE OF MARINE SAFETY INVESTIGATIVE MATERIALS

Does 46 USC 6305(b) require release of materials which would be exempt from disclosure under FOIA, or are FOIA exemptions available when the public requests a copy of a report of investigation?

In propounding the issue, you state that before 46 USC 6305(b) became law, you would have applied FOIA t the case before you and exempted certain enclosures based upon FOIA exemptions. As this comment suggests, we should not ignore the requirements prior to enactment of 46 USC 6305(b).

R.S. 4450 (predecessor to 46 USC 6305(b)) stated that certain reports "shall be public records and be open to inspection at reasonable times by any persons." 46 USC 6305(b) provides that casualty investigation reports "shall be made available to the public." The language of 46 USC 6305(b) appears to clearly mandate that, once final action had been taken, a report of marine casualty investigation must be disclosed in its entirety, except to the extent that it contains classified information related to the national security, and that FOIA exemptions are not authority to withhold information in such a report. (Legislative history on this point is limited to the simple restatement of the statutory provision contained in H. Rep. No. 98-338.)

The language of R.S. 4450 was equally uncompromising. Notwithstanding that language, the Coast Guard's position on release of investigation reports under R.S. 4450 after FOIA was enacted is contained in Marine Safety Manual 72-6-45. All reports, as well as underlying records of investigation, "are generally available to the public in accordance with 49 CFR 7." "The report of a casualty involving loss of life will be considered complete and thus releasable to the public upon [final] action (unless specifically exempted by 49 CFR 7)." 72-6-45B. 49 CFR 7 implements FOIA within the Department of Transportation. "Subpart G-Exemptions" of

49 CFR 7 implements the FOIA exemptions. Thus, the FOIA exemptions have been considered applicable to release of casualty investigation reports. Upon review, I conclude that that position is erroneous and that 49 CFR 7 Subpart G should not be considered applicable to completed marine casualty investigation reports made "public records" or "available to the public" by R.S. 4450 or 46 USC 6305(b).

This does not mean that 49 CFR 7 is wholly inapplicable to marine casualty investigation reports. It is clear that subpart G is inapplicable. "Subpart I - Fees" is applicable, however.

Marine Safety Manual 72-5-30 remains correct. However, the phrase "unless specifically exempted from disclosure" in its first sentence should be understood to refer to 46 USC 6305(b)'s exemption for national security, and not to FOIA exemptions. The same qualification applies to 72-6-45. The reference in 72-6-45B to 49 CFR 7 should be ignored.

You ask whether the term "reports of investigation" in 46 USC 6305(b) includes enclosures and investigative notes.

a. There is no basis for interpreting the term to include investigative notes.

b. Marine Safety Manual 72-6-36B defines narrative report of a casualty as the findings of fact, conclusions, recommendations, and endorsements. In a case where the report of investigation is a narrative report, therefore, the report does not include listed enclosures.

c. In any event, there is no requirement for reports of investigation to have enclosures such as you describe. Requirements for enclosures do not include witness statements and medical reports about living people (see Marine Safety Manual 72-5-50B). Further, the requirements take into account that enclosures "generally are public information" (under FOIA, if not otherwise). Marine Safety Manual 72-6-15 provides that materials which are protected from disclosure should not be made part of the public record. (Investigating officers are accustomed to sending reports of investigations of boating deaths to Headquarters accompanied by state boating accident reports which are not listed as enclosures, in accordance with 72-6-15 and 75-6-15.) Accordingly, FOIA-exempt materials should not be listed as enclosures, even when they are sent to Headquarters with the report.

Aside from enclosures, it is seldom necessary to include confidential information in the text of a report of investigation. Such information should be excluded unless its inclusion will directly further the purpose of the report found in 46 USC 6301.

Failure to exclude certain kinds of information, whether as text or enclosure, could be interpreted to violate statutory prohibitions such as 46 USC 3315, 5 USC 552a (Privacy Act), or 18 USC 1905 (trade secrets). When these or other kinds of confidential information have erroneously been included in a report, the report should be

returned for correction in accordance with Marine Safety Manual 72-5-30 as containing imprudent disclosures or extraneous matter. When such an error is discovered in a report which has become final, the report should be reopened and the error corrected. In any event, when a document is erroneously listed as an enclosure it is not required to be released purely by virtue of the error.

G-LMI Letter 16732 of 12 June 1985

DUTY TO PROVIDE PFDs

A pleasure vessel was traded by its owner (A) to a marine dealership (B) for another boat. (B) did not change the registered owner of the pleasure vessel, and rented it to an individual (C) who loaned it to his brother (D). The vessel sank with nine people and no personal flotation devices on board. An opinion was requested concerning identification of those legally responsible to provide PFDs.

Without knowing the entire factual situation which prompted your request, I assume that the vessel meets the definition of "recreational boat" as found in 33 CFR Part 175, Subpart B. These regulations govern the installation, carrying, or use of associated equipment (including PFDs) on recreational boats and are promulgated under the authority of 46 USC §4302.

With the exception of 33 CFR 175.17 which is not applicable here, "[n]o person may use a recreational boat 16 feet or more in length...unless at least one PFD...is on board for each person[.]" 33 CFR 175.15(b). The word "use" is further defined to mean "operate, navigate, or employ." 33 CFR 175.3[d]. Therefore, anyone who operated, navigated or employed the vessel had the responsibility to ensure it was properly equipped with PFDs.

The operator of the boat at the time of the allision was D. He was operating the vessel at the time when no PFDs were aboard. Consequently, he definitely could be held responsible for PFD violations of 33 CFR 175.15 as a "user" of the boat. He had assumed the responsibilities imposed by federal regulations on the operator of a boat of that type and size.

Additionally, the dealer (B) may be responsible for violations of 33 CFR 175.15. In some livery operations, the organization or individual renting a boat could be cited for PFD equipment violations. In many cases, though it is not clear in this case, the organization or individual retains the all important control over the boat and may be considered as "employing" the boat when it is rented out to the recreational boater for a short cruise. 408 Coast Guard L. Bull. 1 (1974). The fact that this responsibility may be shared with the operator of the boat does not excuse such violations. However, IV.A.2 of the Maritime Law Enforcement Manual, COMDTINST M16247.1 provides that if the boat was properly equipped when rented, but the operator later did something which in effect changed the equipment for the boat, then the operator should [as a

policy matter] be cited for the PFD violations. Consequently, if B did not provide required PFDs when the vessel was rented from them, they too may be responsible for violations of 33 CFR 175.15, depending upon the rental agreement and other circumstances in question.

Unless the factual situation indicates otherwise, it does not appear from the information provided that C operated, navigated or employed the vessel when he let his brother borrow the boat. This is unlike a livery operator who "employs" a boat by receiving consideration for its use. Therefore, 33 CFR 175.15 does not seem to apply to C in this instance.

Ownership of a recreational boat is a question of state law. [See 429 Coast Guard L. Bull. 3 (1982), cf. 1960 A.M.C. 2431 (not otherwise reported).] Without further information on the nature of the agreement between B and A, B appears to be the owner of the vessel even though the boat was still registered to A. However, the issue of ownership is not relevant to a determination of whether there was a violation of 33 CFR 175.15; the only inquiry is whether a person operated, navigated or employed a boat without the proper PFDs aboard.

G-LMI memo 16780 of 9 August 1985

CONVICTION OF DANGEROUS DRUG LAW VIOLATION

Title 46 USC 7704(b) provides for revocation of a license, certificate of registry or merchant mariner's document after a showing that the holder has been convicted of violating a dangerous drug law of the United States or State.

In a recent appeal, Appellant's license had been revoked after he pleaded "nolo contendere" to a charge of possession of cannabis in the Circuit Court of the Seventeenth Judicial Circuit for Broward County, Florida.

Under a procedure authorized by section 948.01(3) of the Florida Statutes, the court accepted Appellant's plea, withheld adjudication of guilt and imposition of sentence, and placed Appellant on probation for one year.

Appellant argued that he was not "convicted" of a narcotic drug offense because the court did not enter a judgment against him.

The Commandant concluded, however, that he had suffered a final conviction. The Commandant stated that when Appellant entered his plea of nolo contendere and the court accepted that plea and placed him on probation, he was "convicted" for all purposes under Florida law. Accordingly, a proceeding under section 948.01(3) of the Florida Statutes satisfies the jurisdictional predicate for revocation of Appellant's license under 46 USC 7704(b).

Appeal Decision 2355 (RHULE) (1984).

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Correction to 434 Law Bulletin 24,

DIVER FLAG: FEDERAL PREEMPTION OF STATE LAW.

The source material for this item was edited in a way that leaves room for confusion. Omitted, among other things, were the following important statements setting forth the legal determination's practical effects:

> A vessel is not exempt from flying the Code 'A' flag merely because it is flying a State prescribed flag.
>
> A vessel approaching the small vessel flying the Code 'A' flag must keep out of the way (Rule 18).
>
> Of course, flying a State-prescribed flag is not prohibited, but it should not be allowed to impair the visibility of the Code 'A' flag.

It should be remembered that a vessel is required to fly the Code 'A' flag only when it is restricted in its ability to maneuver due to diving operations, not whenever it engages in diving operations.

Both the Rules of the Road Advisory Council, in a March 29, 1985 statement, and the Coast Guard, in various statements since that date, have affirmed the following: the "ALPHA" flag signal is to be flown as a means of indicating when a small vessel engaged in diving operations is restricted in ability to maneuver. Flying a State prescribed flag may be used as a personnel identifying signal and may be used either in conjunction with the "ALPHA" flag signal when the vessel is restricted in ability to maneuver, or alone if the vessel is not restricted in ability to maneuver.

G-LMI 16672 of 12 Nov 1985

MERCHANT MARINERS' DOCUMENTS, LICENSES, ETC.;
SUMMARY COURT MARTIAL NOT A "CONVICTION"

The Chief, Maritime and International Law Division was asked whether a summary court-martial "conviction" was a conviction within the meaning of 46 USC 7503(b)(1). He replied:

46 USC 7503 authorizes denial of a license, certificate, or document to a individual who, within 10 years before applying for the license, certificate, or document, has been convicted of violating a dangerous drug law of the United States or of a State.

It also authorizes denial to an individual who has ever been a user of or addicted to a dangerous drug, unless cured. A companion provision, 46 USC 7704, provides for revocation of the previously issued license, certificate, or document of an individual who has been so convicted, or has been a user or addict.

The original concern which led to these provisions was that, without it, "a large number of convicted addicts and/or traffickers are now able to serve in the United States merchant marine to the detriment of shipboard safety, morale and discipline" because the Coast Guard was unable to proceed against their licenses, certificates, or documents for drug offenses ashore. S.Rep. No. 83-1648 (1954), reprinted in 1954 U.S. Code Cong. & Ad. News 2558.

This concern remains today. However, the statute's remedy for it is not as comprehensive as possible. It does not provide authority to deny a license, certificate, or document to an individual who has not been a user or addict but who has violated drug laws, unless that individual has been convicted of the violation. Neither an agency's prior administrative finding of a violation nor a present Coast Guard finding of a violation will suffice.

In Middendorf v. Henry, 425 U.S. 25, 96 S.Ct. 1281 (1976), the Supreme Court held that a summary court-martial was not a "criminal prosecution" for purposes of the Sixth Amendment, and that a defendant had no Constitutional right to counsel at summary court-martial. 425 U.S. at 43, 96 S.Ct. at 1291.

The court reached this conclusion based on several factors: the unique, non-adversarial nature of the proceedings, the military nature of most of the offenses, the limited consequences, all combined with the distinctive nature of military life and discipline.

One of these factors, consequences, stands out as highly significant to the present analysis. The Court declared that conviction of typical military offenses "would likely have no consequences for the accused beyond the immediate punishment meted out by the military, [which is very limited,] unlike conviction for such civilian misdemeanors as vagrancy or larceny which could carry a stamp of 'bad character' with conviction. [footnote omitted]" 425 U.S. at 40, 96 S.Ct. at 1281. The Court found no basis for concern about "collateral consequences" that might follow from a conviction by summary court-martial; it appears that the Court did not believe that a summary court-martial judgment would be included in the general category of convictions.

Since the Court based its holding in part on the absence of collateral consequences flowing from a summary court-martial judgment, we should be cautious about creating any such collateral consequences. Moreover, the Court's emphasis on the unique nature of the proceedings and the military regime in which they are found should make us doubly cautious about treating the summary court-martial judgment the same as any other conviction.

The Court of Military Appeals, proceeding from the Middendorf v. Henry analysis, concluded that summary courts-martial "are not

criminal convictions for any purpose." U.S. v. Booker, 5 M.J. 238, 241 n. 14 (C.M.A. 1977). Although that conclusion cannot be binding outside the military justice forum in which the Court of Military Appeals speaks, it has persuasive force.

The Middendorf v. Henry opinion has been criticized on the ground that the summary court-martial, with its abbreviated record and its simple procedure unencumbered by many features which might protect a defendant, provides fertile ground for injustice, and therefore needs the protection for the defendant that a right to counsel would provide. Note, 54 Tex. L. Rev. 1471 (1976). Such criticism underscores the unique nature of the summary court-martial, and hence the fragility of the thread between it and the common understanding of the word "conviction."

Neither the legislative history of 46 USC 7503 nor the legislative history of its predecessor statute, the Act of July 15, 1954, sheds any light on the issue.

Based on the Supreme Court's decision in Middendorf v. Henry, it appears that a summary court-martial "conviction" should not be considered a conviction within the meaning of 46 USC 7503(b)(1).

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UNITED STATES CODE

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10 U.S.C. 1071
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10 U.S.C. 1074(a)
435 LB 6

10 U.S.C. 1075
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10 U.S.C. 1078 a through c
435 LB 6

10 U.S.C. 1085
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10 U.S.C. 1169
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10 U.S.C. Chapter 55
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29 U.S.C. 207(a)
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29 U.S.C. 213(b)(6)
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29 U.S.C. 651, et seq.
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435 LB 23

33 U.S.C. 1208(b)
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33 U.S.C 1321(b)(3)
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33 U.S.C. 1608(b)
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33 U.S.C. 2072(b)
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42 U.S.C. 253
435 LB 5

42 U.S.C. 2651 et seq.
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42 U.S.C. 4332(2)(C)
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43 U.S.C. 1331 et seq.
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UNITED STATES CODE (CONT'D)

43 U.S.C. 1347(c)
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46 U.S.C. 9
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46 App. U.S.C. 77
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46 App. U.S.C. 83j
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46 App. U.S.C. 86d
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46 App. U.S.C. 88b
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46 App. U.S.C. 239b
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46 App. U.S.C. 319
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46 U.S.C. 405(b)
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46 U.S.C. 2101(11a)
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46 U.S.C. 2101(11)(b)
435 LB 26

46 U.S.C. 2101(11)
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46 U.S.C. 2101(21)(A)
435 LB 14,15

46 U.S.C. 2101(22)
435 LB 14

46 U.S.C. 2104
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46 U.S.C. 2104(a)
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46 U.S.C. 2105(a)
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46 U.S.C. 3301
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46 U.S.C. 3308(1)
435 LB 13

46 U.S.C. 3315
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46 U.S.C. 3315(b)
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46 U.S.C 3316
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46 U.S.C. 4302
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46 U.S.C. 6305(b)
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46 U.S.C. 7503
435 LB 31,33

46 U.S.C. 7503(b)(1)
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UNITED STATES CODE (CONT'D)

46 U.S.C. 7704
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46 U.S.C. 7704(b)
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46 U.S.C. 8103(a)
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46 U.S.C. 8103(b)
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46 U.S.C. 8104(d)
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46 U.S.C. 8304
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46 U.S.C. 8902
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46 U.S.C. 8903
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46 U.S.C. 10311(d)
435 LB 9

46 U.S.C. 12308
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46 U.S.C. 13103(a)
435 LB 1

46 U.S.C. 13106
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CODE OF FEDERAL REGULATIONS

29 CFR 1910
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29 CFR 1926
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33 CFR 1.07
435 LB 13,15

33 CFR 1.07-20(c)
435 LB 13

33 CFR 164.53(b)
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33 CFR 164.53
435 LB 12

33 CFR 175 Subpart B
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33 CFR 175.15
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40 CFR Parts 1500-08
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40 CFR 1501.5(b)
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40 CFR 1506.3
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46 CFR 42.07-55
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46 CFR 42.09-15(d)
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46 CFR, Subchapter C
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49 CFR 1.45(a)(1)
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49 CFR 176.30(a)(3)
435 CFR 20

49 CFR 176.30(a)(7)
435 LB 20

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REVISED STATUTES

R.S. 4450
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LAW BULLETIN

367 LB 1 (1966)
435 LB 17

395 LB 12 (1971)
435 LB 5

408 LB 1 (1974)
435 LB 29

429 LB 3 (1982)
435 LB 30

ACTS

Administrative Procedure Act
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COMDTINST M1000.6 (Personnel Manual), Chapter 12
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COMDTINST M16247.1 (Maritime Law Enforcement Manual
435 LB 29

COMDTINST M16475.1B (National Environmental Policy Act Implementing Procedures), para 3.D.4
435 LB 11

COMDTINST M16590.5 (Bridge Administration Manual), para. 2.C.3
435 LB 11

Coast Guard Supplement to the Manual for Courts-Martial, §0510
435 LB 2

Coast Guard Supplement to the Manual for Courts-Martial, §§0510d, 0304d
435 LB 3
Marine Safety Manual 6-45
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H. Rep. 338, 98th Cong., 1st Sess., Pg. 122
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OMB Circular A-19
435 LB 9,10

Treasury Decision 54281
435 LB 21

Principles of Federal Appropriations Law, 5-62 through 5-68 (1st ed. 1982)
435 LB 7

5 M.J. 238, 241 n. (C.M.A. 1977)
435 LB 33

130 Cong. Rec. 1173 H7230 (daily ed. June 27, 1984)
435 LB 26

130 Cong. Rec. S8457 (daily ed. June 27, 1984)
435 LB 27

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